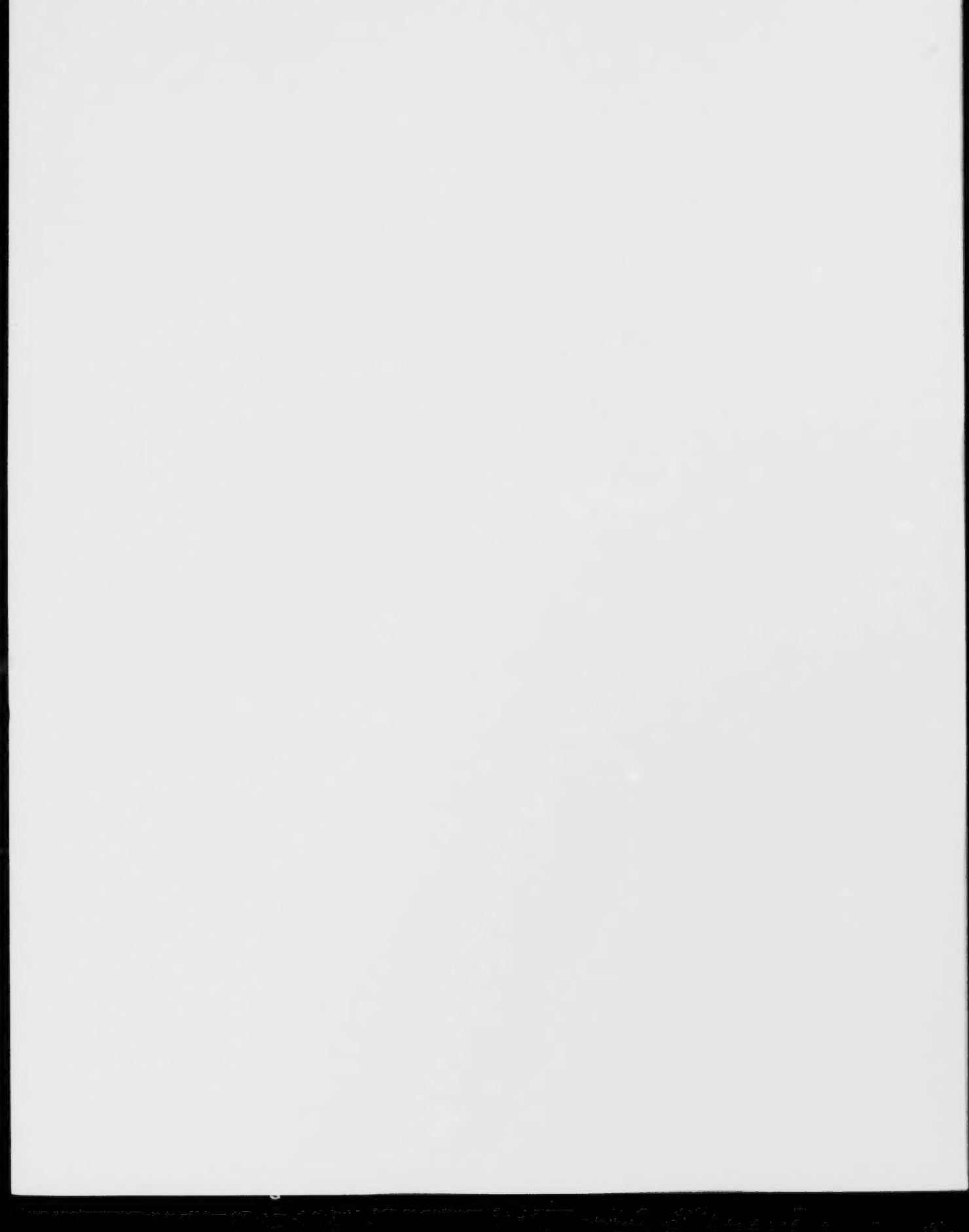


Fixing the  
Deficiencies in  
Parliamentary  
Review of Anti-  
terrorism Law

Lessons from the  
United Kingdom  
and Australia

Craig Forcese





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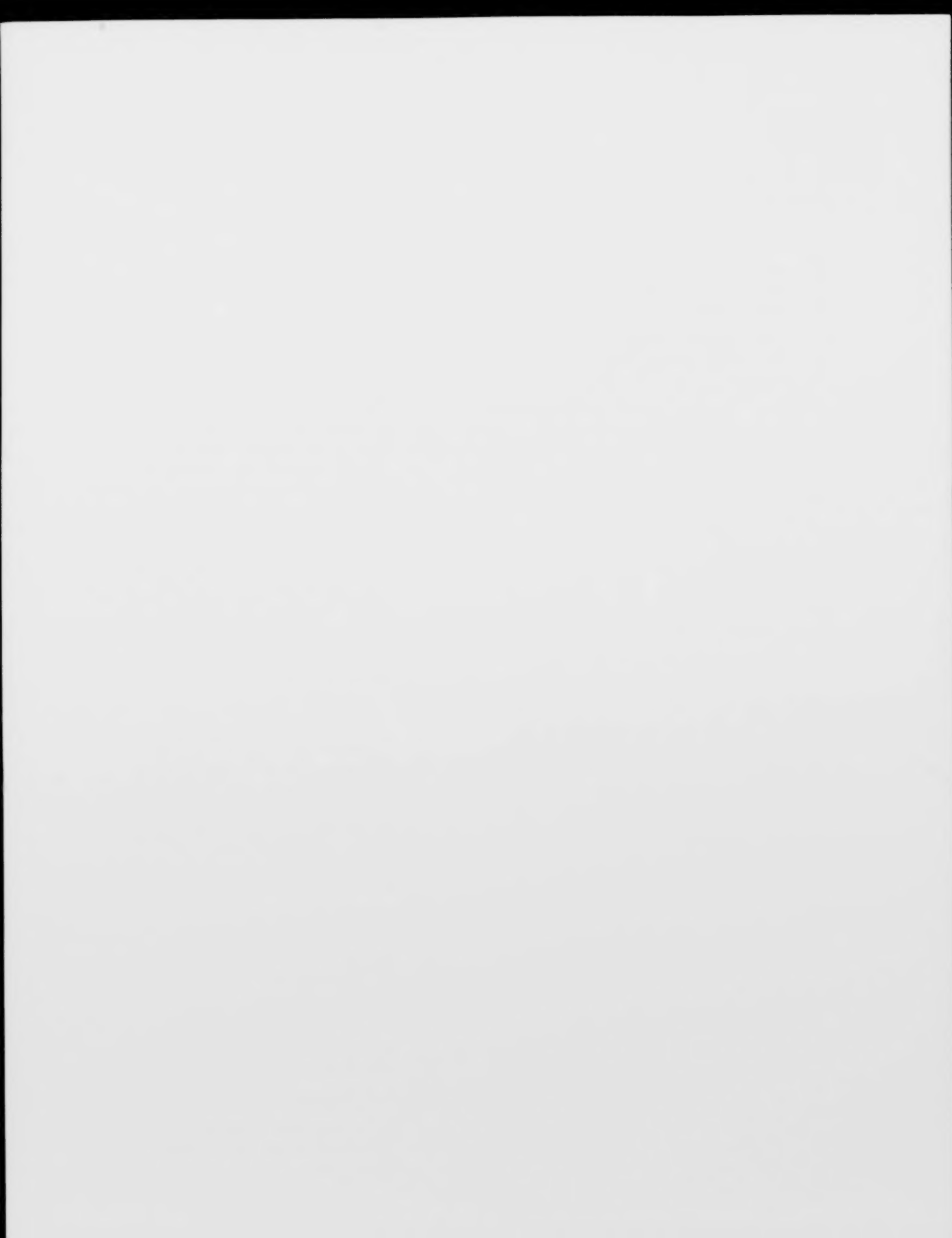
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# Security and Democracy / Sécurité et démocratie

Research Directors/ Directeurs de recherche

Mel Cappe and/et Wesley Wark

**T**his IRPP research program explores the complex challenges confronting Canada with regard to the post-9/11 security environment and its impact on domestic and international policies. The research addresses issues that are in many ways new to the country and to the formulation of Canadian national security policy, above all the threat posed by global, transnational terrorism. The program examines the interrelationships between new security demands and democratic norms, focusing in particular on the building blocks of a sound democratic model for national security, namely, effective intelligence; capable law enforcement; appropriate, stable laws; good governance; accountability; citizen engagement and public knowledge; emergency response capability; wise economic policy; and public-private sector partnerships.

**C**e programme de recherche s'intéresse aux défis de sécurité d'une grande complexité que le Canada doit relever depuis le 11 septembre, de même qu'à leur incidence sur nos politiques nationales et internationales. Il traitera d'enjeux souvent inédits pour notre pays en matière de sécurité nationale, notamment le terrorisme mondial et transnational. Le programme vise à analyser l'interrelation entre les nouvelles exigences de sécurité et les normes démocratiques, de manière à définir les éléments de base suivants : un modèle de sécurité nationale pleinement démocratique, notamment en matière de renseignement ; l'efficacité du maintien de l'ordre ; la stabilité et la légitimité des lois ; la gouvernance éclairée ; la responsabilisation ; l'engagement citoyen et l'information du public ; l'intervention d'urgence ; une politique économique avisée ; et les partenariats entre les secteurs public et privé.

## Contents

2	Introduction
3	Background to Review of the <i>Anti-Terrorism Act</i>
13	Comparative Parliamentary Review in National Security Matters
16	Lessons for Canada
20	Notes
23	References

# Fixing the Deficiencies in Parliamentary Review of Anti- terrorism Law

Lessons from the United  
Kingdom and Australia

Craig Forcese

## Introduction

In many areas of government, parliamentary committees play a key role in holding ministers (and, de facto, their officials) to account. The Canadian Parliament has powers to summon and even compel the appearance of officials,<sup>1</sup> including ministers.<sup>2</sup> Likewise, committees may "send for persons, papers and records"<sup>3</sup> and Parliament and its committees may administer oaths requiring truthful responses.<sup>4</sup> Parliament (and by extension its committees) also possesses contempt powers.<sup>5</sup>

All this suggests that parliamentary committees can be potent review bodies in the area of national security. To date, however, parliamentary review of national security matters has been largely perfunctory. Both the Senate and the House of Commons have national security and defence committees.<sup>6</sup> The Senate committees in particular have been active in holding hearings and producing reports on various aspects of Canada's national security and defence policy. Most recently, the Commons national security committee held hearings examining the role of the commissioner of the Royal Canadian Mounted Police (RCMP) in the Maher Arar matter, a focus precipitated by the findings of the Arar inquiry and fuelled by apparent contradictions in the commissioner's testimony. Controversy sparked by these hearings culminated in the commissioner's resignation in late 2006.

Parliamentary committees – and Parliament as a whole – have not, however, played a systemic or concentrated role in reviewing Canada's national security and defence policies. Indeed, some critics describe their performance as utterly inadequate (see, for example, Bland and Rempel 2004). The 2004-07 parliamentary review of the *Anti-terrorism Act* (ATA)<sup>7</sup> does little to alter this conclusion. While the reports issued by the two committees – Commons and Senate – charged with reviewing the legislation are lengthy and in many places substantive, they were

delayed by years. The Commons committee in particular underwent a turnover in membership between the point at which most evidence was heard and the drafting of the report. The majority report of the Commons committee, unlike that of its Senate counterpart, ignored or failed to articulate recommendations in a number of controversial areas since the attacks of September 11, 2001 (9/11). The deliberations of neither committee proved influential in the acrimonious and at times simplistic February 2007 debate over the extension of two sunset provisions of the ATA.

The impact of the reports on future government and parliamentary action in relation to anti-terrorism law remains unclear.<sup>8</sup> While the government responded to the Commons report in July 2007, its response was unenlightening, both because it reacted to recommendations that were themselves often minor and technical and because it cited the need for further consideration in relation to the major proposals. Even at this early juncture, however, one can draw conclusions from the process surrounding the ATA review about the future of parliamentary review in the national security area. In his exhaustive analysis of this process, Kent Roach concludes that "parliamentary and public debates about national security matters should be becoming more sophisticated and nuanced as we move away from 9/11 and devote more resources and thought to national security matters. Unfortunately they seem to be getting less substantive" (Roach 2007, 29).

Roach's conclusion raises the question of whether parliamentary participation in national security decision-making can be enhanced in such a way as to contribute meaningfully to policy development. This article takes up the question in three parts. In the first part I examine in detail the ATA review, building on Roach's review and comparing and contrasting the Commons and Senate reports. I evaluate the quality of these assessments by gauging the extent to which each grappled with a series of flaws and uncertainties in the terrorism law that have emerged since 2001. In the second part I analyze the comparative experiences of the United Kingdom and Australia with regard to parliamentary participation in national security policy-making. Drawing on this analysis, in the third part I suggest a revamped Canadian parliamentary review role with respect to national security policy and law-making.

## Background to Review of the Anti-terrorism Act

Parliament's scrutiny of the average bill occurs during its promulgation as a statute. In Canadian practice, government bills are devised and drafted within the executive and are tabled in Parliament in the form that is most pleasing to the government. In majority Parliaments, a government bill typically passes through both houses with few changes. In minority Parliaments, outcomes are less certain and government bills are recrafted, sometimes dramatically, by parliamentary committees (typically after second reading, but more aggressively in cases where the bill is routed directly to committee after first reading).

Parliamentary committees are subsets of Parliament tasked with the detail work. In the Commons, their terms of reference are established by standing orders and special orders. While there are six different types of standard committee, standing committees are the most important vehicle for committee work in the Commons.<sup>9</sup> Pursuant to the Commons standing orders, for example, standing committees are "empowered to study and report on all matters relating to the mandate, management and operation of the department or departments of government which are assigned to them from time to time by the House." Among other responsibilities, they are charged with reviewing "the statute law relating to the department assigned to them."<sup>10</sup>

In most cases, parliamentary scrutiny ends with the enactment of the bill as a statute. There is nothing to stop parliamentary committees from subsequently scrutinizing statute law lying within their mandate, assessing its performance and utility. In practice, however, unless and until amendments to (or repeal of) a law are considered desirable (usually via another government bill), at some point in the future, Parliament has no further role to play in relation to the statute. There are two notable exceptions to this pattern. One is that the law may include sunset provisions, automatically terminating some or all provisions of a statute by a particular time unless there is further parliamentary intervention. The other is that the law itself may oblige Parliament to reconsider its provisions by a given date, by mandating a parliamentary review. As we shall see, both of these exceptions were incorporated into the 2001 *Anti-terrorism Act*.

**The policy environment for anti-terrorism law**  
National security law – including anti-terrorism law – presents special challenges to the conventional parliamentary process.

First, anti-terrorism law is sometimes promulgated in times of crisis and with a sense of urgency. This can serve to create a poisonous political environment. As Lynch observes of the Australian experience, "The stakes are always raised in respect of counter-terrorism laws because to oppose or seek amendment of these Bills is to risk being portrayed as exposing the community to unnecessary danger" (2006, 776).

Further, debate over terrorism laws may be coloured by perceived or real external political or legal pressures. For example, Parliament promulgated the ATA at dizzying speed, in just over two months, in the immediate aftermath of 9/11 and UN Security Council resolution 1373.<sup>11</sup> This resolution, issued via the Security Council's potent UN Charter chapter VII powers, effectively imposes the substantive obligations of the 1999 international terrorist financing convention. Its writ is even broader, however, and in some respects it constitutes a universal, comprehensive anti-terrorism instrument. It requires states to "ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice and ensure that, in addition to any other measures against them, such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts" (emphasis added).

Resolution 1373 was, clearly, the impetus behind the ATA. The deputy prime minister told a parliamentary committee in 2002, "The *Anti-terrorism Act* is an unprecedented piece of legislation and brings Canada into full compliance with United Nations Security Council Resolution 1373."<sup>12</sup> Likewise, Canada's justice minister told a parliamentary committee in 2005 that specific offences were included in the ATA to comply with the Security Council's dictates.<sup>13</sup> In its reporting to the UN Security Council's Counter-Terrorism Committee, Canada has characterized the ATA as responsive to resolution 1373 (Foreign Affairs and International Trade Canada 2001).

It is doubtful that the general language of resolution 1373 called for all the minutiae of the ATA, especially given the absence of a definition of "terrorist act" in the resolution. Nevertheless, the ATA represents an extraordinary law – one motivated and

designed at least in part to comply with the specific instructions of the Security Council.

Second, anti-terrorism is complex. The ATA is sweeping, creating a new definition of terrorist activity in Canada's Criminal Code<sup>14</sup> and barring multiple terrorism-related financial activities and assorted (sometimes arcane) inchoate offences. More than this, the law includes significant new government secrecy laws – most notably a revised and partially updated *Security of Information Act*<sup>15</sup> – and makes concordant changes to more than a dozen other federal laws. Meanwhile, the omnibus *Public Safety Act*<sup>16</sup> of 2004 enhances the powers of several ministers to respond to emergencies under a large number of statutes. The *Public Safety Act* also facilitates the sharing of passenger information between airlines and government and fulfils Canadian obligations under the *Biological and Toxin Weapons Convention*. For its part, the *Immigration and Refugee Protection Act (IRPA)*,<sup>17</sup> in force since 2002, contains a number of provisions with respect to national security, including the revamped security certificate process that has attracted sustained public and court scrutiny. When these newest laws are added to existing national security provisions in statutes such the *Canadian Security Intelligence Service Act*,<sup>18</sup> the *Security Offences Act*,<sup>19</sup> the *Nuclear Safety and Control Act*,<sup>20</sup> the *Emergencies Act*<sup>21</sup> and the *National Defence Act*,<sup>22</sup> the legal terrain encompassed by anti-terrorism takes on mammoth dimensions, compounding the problem of complexity.

Third, anti-terrorism law responds to uncertain dangers while at the same time straddling conventional divisions in the policy and parliamentary communities with regard to subject matter. The Commons, for example, has a (relatively new)

**Table 1**  
**Parliamentary Committees Reviewing Legislation Relating to Anti-terrorism after Second Reading, Canada**

Instrument	Commons committee	Senate committee
<i>Anti-terrorism Act</i>	Standing Committee on Justice and Human Rights	Special Senate Committee on Bill C-36
<i>Immigration and Refugee Protection Act</i>	Standing Committee on Citizenship and Immigration	Standing Senate Committee on Social Affairs, Science and Technology
<i>Public Safety Act</i>	Special Legislative Committee	Standing Senate Committee on Transport and Communications



national security committee, but also separate committees dedicated to justice, immigration, and privacy and access to information. As table 1 shows, different committees may be charged with examining different anti-terrorism-related statutes during their respective legislative processes.

At the bureaucratic level, the development of different statutes grappling with specific anti-terrorism issues is centred in different departments. Meanwhile, operating independently of these departments are the auditor general and the privacy and information commissioners – officers of Parliament whose mandate extends to several areas of law affected by anti-terrorism statutes. There is, however, no officer of Parliament whose writ reaches across all national security law or even anti-terrorism law. Within the security/intelligence community itself, arm's-length review responsibilities are "stovepiped" between the Security Intelligence Review Committee (for the Canadian Security Intelligence Service – CSIS) and the commissioner of the Communications Security Establishment (CSE). Currently, no equivalent body exists for the RCMP.

Turning to academia, only a handful of scholars specialize in national security or anti-terrorism law, and only a handful of law schools offer courses on these subjects. Academics tend to have more expertise in criminal, privacy or immigration law.

All these actors are asked to grapple, in a democratic policy-making environment, with a threat that is often inchoate in nature. As Lynch notes, "It is extremely difficult for parliamentarians to know the true extent of the threat to the nation's security when trying to insist either upon a more consultative, careful process or the inclusion of specific powers and safeguards" (2006, 778).

For all these reasons, anti-terrorism law is an area in which trees may attract scrutiny more readily than the forest – that is, attention is drawn to a handful of particularly controversial areas, leaving the bulk of anti-terrorism measures unexamined.

### The ATA legislative process

The process by which the ATA was enacted reflects this challenging policy environment. As we have seen, the ATA is an enormous and complex statute, amending or creating from whole cloth a host of unusual statutory provisions. It would be an exaggeration to suggest that the immediate post-9/11 context, the speed of enactment or the Security

Council impetus for the ATA precluded voluminous debate over the Act and its content. As Roach notes:

Books were written about the Bill and the media produced extensive analyses of its potential effects on civil liberties. Groups representing Aboriginal people, unions, charities, refugees and lawyers, as well as watchdog review agencies such as the privacy and access to information commissioners and the Canadian Human Rights Commission, all voiced their concerns about the Bill, as originally drafted, to committees in the Commons and the Senate. These committees made some important recommendations, many of which were later adopted by the government. (Roach 2007, 4)

Nevertheless, it is also true that the "complex, omnibus nature of the ATA made it difficult for interested persons and parliamentarians to assess all parts of the Act" (Roach 2007, 5). The debate over the ATA focused on the definition of terrorist activity, the Act's impact on charities and the two unusual law-enforcement powers introduced by the Act: investigative hearings, and the colloquially labelled "preventive detention." Almost lost in the shuffle were the "implications of the more technical parts of the Act relating to signals intelligence, terrorist financing and government secrecy" (Roach 2007, 5).

In hindsight, the Act overreached, adopting, for example, a definition of terrorist activity that was more sweeping than strictly necessary and that has since attracted negative judicial treatment on constitutional grounds. It also under-legislated, leaving intact, for example, the anti-leakage provision of the renamed *Official Secrets Act* (a provision ultimately struck down on constitutional grounds). It left for another day a number of issues in public safety law and immigration law ultimately dealt with in the *Public Safety Act* and the *IRPA*. None of these instruments, moreover, addressed questions of organization and structure in national security matters. Executive government was ultimately reorganized under the Martin administration with the creation of Public Safety Canada. This was a response to concerns raised in an auditor general's report examining Canadian anti-terrorism spending from 9/11 through 2003 (Auditor General of Canada 2004, chap. 3). The report noted a lack of coordination and information sharing on public security issues between government departments as they then existed, with various security-related agencies reporting to an array of ministers. However, this Martin-era shuffling of the bureaucratic deck left intact the review mechanisms later questioned by the Arar Commission (in 2006).

In fact, since 2001, certain lacunae and shortcomings of the ATA and related instruments have created a number

of uncertainties and controversies in the area of Canadian anti-terrorism law, the most notable of which involve several constitutional rulings. Despite its evident provenance in the horror of 9/11, the ATA is quite emphatically not emergency legislation. It is a regular statute of Parliament, not an extraordinary executive branch regulation issued under the *Emergencies Act*. Nor does the ATA invoke the Canadian Charter of Rights and Freedoms<sup>23</sup> section 33, the notwithstanding clause. It is therefore subject to exactly the same constitutional discipline as any other piece of legislation.<sup>24</sup> The most important constitutional rulings in relation to anti-terrorism law at the time of writing include:

- a successful lower court challenge to the constitutionality of the definition of "terrorist activity" on the grounds of freedom of association and expression<sup>25</sup>
- a successful lower court challenge to the anti-leakage provision in the Security of Information Act<sup>26</sup>
- successful lower court challenges to the reach of secrecy provisions in the *Canada Evidence Act*<sup>27</sup>

Meanwhile, the IRPA security certificate regime has also attracted negative constitutional scrutiny, in the form of a successful Supreme Court challenge to the security certificate procedures (particularly, the reliance by government on secret information never disclosed to the interested party)<sup>28</sup> and controversy over the legality of removing an alien when there are grounds for believing he or she will be tortured.<sup>29</sup>

Other controversies that have emerged since 2001 relating to the ATA or national security procedures and law include the following:

- an overt dispute between the government and the CSE commissioner over the interpretation of intercept authorization provisions applicable to the CSE (see, for example, Communications Security Establishment Commissioner [2007, 3])
- controversies surrounding government secrecy, privacy and intelligence-sharing (most notably those revealed by the Arar Commission)<sup>30</sup>
- questions concerning the development of enhanced review mechanisms (parliamentary or otherwise) for security and intelligence agencies (Commission of Inquiry 2006)

These developments supplement the list of complaints and concerns that animated the original ATA debate, including questions of ethnic profiling, the impact of anti-terrorism law on charities and the legal profession, and an overarching concern about the erosion of civil liberties (as manifested most controversially in the preventive detention and investigative hearing provisions).

## The ATA review process

While not all of these specific concerns and developments could have been anticipated in 2001, Parliament was alive to the controversies that anti-terrorism legislation was likely to provoke. After all, the ATA marked a departure for Canadian criminal law, both in the reach of its substantive offences and in the extraordinary powers it extended to law-enforcement agencies. Moreover, this exceptional legislation would be potentially permanent.

The parliamentary response to the unease caused by the ATA among civil libertarian and Muslim groups in particular came in two forms: a provision requiring a three-year parliamentary review of the Act, and provisions automatically sunseting the preventive detention and investigative hearing powers after several years unless revived by motions in both houses of Parliament. It is fair to say that neither of these parliamentary review mechanisms operated in the fashion hoped by its proponents.

### The "three-year" review

#### *Procedural background*

The ATA specifies that "within three years after this Act receives royal assent, a comprehensive review of the provisions and operation of this Act shall be undertaken" by either joint or separate committees of the Commons or Senate.<sup>31</sup> The Act further specifies that the resultant report be tabled in Parliament within a year after the review is conducted. The Act received royal assent on December 18, 2001. The three-year review was begun before a special sub-committee of the Commons national security committee on December 7, 2004, and in a special Senate ad hoc committee on December 15, 2004.

The ATA review was notable for two qualities: its breadth and its duration. In relation to breadth, both parliamentary committees went beyond their strict mandate, incorporating into their deliberations scrutiny of anti-terrorism provisions not part of the ATA itself; both committees, for example, examined the security certificate process housed in the IRPA.

In terms of duration, the review process was greatly prolonged. Under the provisions of the ATA, the findings of the two committees were to be tabled by the end of 2005. In reality, the reports were not completed until February (Senate) and March (Commons) of 2007 (Senate of Canada 2007; House of Commons Subcommittee on the Review of the *Anti-terrorism Act* 2007). The three-year review became almost literally a review that took three years.

These delays had implications for the continuity of at least the Commons review. Between the review's commencement and its conclusion, one minority government ended and another took office, producing considerable turnover on the roster of committee members in the Commons. A total of ten MPs sat on the subcommittee during one or both of the two sessions of Parliament over which the review took place (table 2). However, only four of these ten individuals were subcommittee members in both sessions. Four of the seven subcommittee MPs whose names appear on the final report were, therefore, theoretically present

for the 38 substantive sittings that included testimony and consideration of the report.<sup>32</sup> The public meetings, conducted over 21 sittings, included testimony by 91 witnesses.

The three other members who joined the subcommittee for the 39<sup>th</sup> Parliament would have been available for the small portion of the public sittings that took place during the 39<sup>th</sup> Parliament.<sup>33</sup> The vast majority of the meetings in the 39<sup>th</sup> Parliament were in camera and concerned the drafting of the final report and its recommendations. While witnesses during the 38<sup>th</sup> Parliament included many non-officials, those few who appeared before the

**Table 2**  
**Composition of Commons Subcommittee on the Review of the *Anti-terrorism Act*, Canada**

Members of Parliament	Position/party	38 <sup>th</sup> Parliament	39 <sup>th</sup> Parliament	Meetings (public and in camera) attended (%)	Public meetings attended (%)
Gord Brown	Chair (39 <sup>th</sup> Parliament), Conservative	No	Yes	47.37	4.76
Joe Comartin	New Democratic Party	Yes	Yes	78.95	95.24
Roy Cullen	Vice-chair (39 <sup>th</sup> Parliament) Liberal	Yes	Yes	81.58	80.95
Dave MacKenzie	Conservative	No	Yes	44.74	4.76
Serge Ménard	Vice-chair (38 <sup>th</sup> and 39 <sup>th</sup> parliaments) Bloc Québécois	Yes	Yes	100.00	100.00
Peter MacKay	Conservative	Yes	No	47.37	85.71
Rick Norlock	Conservative	No	Yes	47.37	4.76
Kevin Sorenson	Vice-chair (38 <sup>th</sup> Parliament) Conservative	Yes	No	52.63	95.24
Tom Wappel	Liberal	Yes	Yes	81.58	76.19
Paul Zed	Chair (38 <sup>th</sup> Parliament) Liberal	Yes	No	36.84	66.67
<b>Parliamentary staff</b>					
Louise Hayes	Clerk of the Committee (39 <sup>th</sup> Parliament)		Yes		
Marc Toupin	Clerk of the Committee (38 <sup>th</sup> Parliament)	Yes			
Wade Riordan Raaflaub	Parliamentary Information and Research Service, Library of Parliament		Yes		
Philip Rosen	Parliamentary Information and Research Service, Library of Parliament	Yes	Yes		

subcommittee during the 39<sup>th</sup> Parliament were all government office-holders. The MPs added to the subcommittee roster during the 39<sup>th</sup> Parliament would have had access to the transcripts of testimony by (and often written submissions from) earlier witnesses. It is unlikely, however, that they would have had the same level of exposure to – and time to reflect on – the issues at play in the review as did their colleagues who had participated in the full *vive voce* process.

The net result is that only a bare majority of the MPs who drafted the Commons final report were present to hear from the vast majority of the witnesses who appeared during the review process. Two of the MPs, Joe Comartin (New Democratic Party) and Serge Ménard (Bloc Québécois), dissented from the final report. The majority final report, as a result, was drafted by five MPs, only two of whom were subcommittee members throughout the review process.<sup>34</sup>

Given this procedural backdrop to the subcommittee proceedings, it is perhaps not surprising that the recommendations formulated in the majority Commons report make a very modest contribution in addressing areas of uncertainty in Canadian anti-terrorism law, a point to which I return below.

The experience of the special Senate committee was quite different. A majority of senators on the committee had reviewed the ATA when it passed through the legislative process in 2001. They therefore brought considerable expertise to the review process (Roach 2007, 12). Moreover, turnover was less dramatic in the Senate committee than in the Commons subcommittee (table 3). By the time of the report's release, only two senators who were not members of the committee when it began meeting in the 38<sup>th</sup> Parliament had been added to the committee. One of these, Senator David Smith, began attending sittings very early in the 38<sup>th</sup> Parliament and thus was present during most of the public sessions in which evidence was heard.

Therefore the vast majority of members were theoretically available during the 59 sittings during which the Senate committee heard or reviewed evidence.<sup>35</sup> The committee heard from some 140 witnesses (several of whom appeared more than once). Not every member was present at every sitting, and attendance rates for the Senate committee were on the whole no better than those for the Commons committee. However, by most measures – membership turnover, number of sittings, hours of deliberation and number of witnesses – the Senate committee outperformed its

**Table 3**  
**Composition of the Senate Special Committee on the *Anti-terrorism Act*, Canada**

Senators	Position/party	38 <sup>th</sup> Parliament	39 <sup>th</sup> Parliament	Meetings (public and in camera) attended (%)	Public meetings attended (%)
Raynell Andreychuk	Deputy-chair (38 <sup>th</sup> Parliament) Conservative	Yes	Yes	77.97	77.08
Joseph Day	Vice-chair (39 <sup>th</sup> Parliament), Liberal	Yes	Yes	52.54	52.08
Joyce Fairbairn, P.C.	Chair (38 <sup>th</sup> Parliament) Liberal	Yes	Yes	96.61	97.92
Joan Fraser	Liberal	Yes	Yes	83.05	81.25
Mac Harb	Liberal	Yes	No	1.69	2.08
Mabina Jaffer	Liberal	Yes	Yes	54.24	50.00
Serge Joyal, P.C.	Liberal	Yes	Yes	91.53	93.75
Noël Kinsella	Conservative	Yes	Yes	44.07	43.75
John Lynch-Staunton	Conservative	Yes	No	38.98	47.92
Pierre-Claude Nolin	Deputy chair, (39 <sup>th</sup> Parliament) Conservative	No	Yes	20.34	6.25
David Smith	Chair (39 <sup>th</sup> Parliament) Liberal	No	Yes	67.80	64.58

Commons counterpart. As discussed below, the recommendations included in the Senate committee's final report also tend to be more comprehensive in assessing the status quo in Canadian anti-terrorism law.

#### Analysis of reports

I will not rehearse in detail here the substantive legal issues addressed in the committees' reports. The purpose is simply to measure the legal significance and policy relevance of the recommendations made by each committee. To this end, I will sort the recommendations into three classes: affirms status quo, proposes minor changes and proposes major changes. A recommendation that affirms the status quo is one that expressly endorses the existing law. One that proposes minor changes supports modifying the existing law but in a manner that does not alter its reach or likely effect, or that does so in ways that are of limited legal significance. A recommendation that proposes major changes supports a modification that would alter the reach or likely effect of the existing law; examples of such changes are new criminal offences or defences and adjustments to existing systems of adjudication, review or oversight that deviate significantly from the status quo.

Given these definitions, the partition of recommendations into major and minor is a subjective exercise. However, since the same subjectivity was applied to both the Commons report and the Senate report, this categorization may usefully be employed for comparative purposes. Table 4 shows the results of the comparative analysis.

Caution is advised against making too much of this comparison of recommendations.<sup>36</sup> In addition to the qualitative nature of the distinction between major and minor changes, the comparison is influenced by the manner in which recommendations are packaged. For example, one committee might try to effect a major change with a single recommendation while the other committee might try to do so with several recommendations, thereby inflating the number of recommendations labelled major.

**Table 4**  
**Commons and Senate Recommendations, by Significance (percent)**

Committee	Major changes proposed	Minor changes proposed	Status quo affirmed	Total
Commons	24 (34)	43 (61)	3 (4)	70 (100)
Senate	22 (55)	17 (42.5)	1 (2.5)	40 (100)

Further, this methodology would serve to devalue the significance of a committee report that is content with the status quo, an attitude that vitiates the inclination to make recommendations of any sort.

The data in table 4 do nevertheless permit a comparison, however imperfect, and they also capture the flavour of each report: The Senate report is unquestionably more assertive in proposing significant changes to the functioning of Canadian anti-terrorism law, and is less preoccupied with line editing and redrafting. Specifically, the Senate report grapples with many of the key legal disputes and uncertainties that have arisen in anti-terrorism law since 2001. Moreover, many of its recommendations in these areas are indeed "major."

The Commons report is silent on several of these matters, and where it is not silent (as with the *Canada Evidence Act*<sup>37</sup>) it proposes a series of minor changes. In other areas it canvasses the controversy but fails to recommend a course of action. Particularly notable in this respect is its failure to propose any reaction to a court ruling (which the government chose not to appeal) invalidating the anti-leakage provisions of the *Security of Information Act*. One might reasonably expect parliamentarians to show an interest in proposing some course of action, thus filling a legal vacuum.

To be fair, the Commons report does focus much attention on areas not thoroughly canvassed by the Senate, most notably the security certificate process under the *Charities Registration (Security of Information) Act*.<sup>38</sup> Moreover, it does propose a new criminal offence (albeit the highly dubious crime of glorifying terrorist activity). Nevertheless, the Commons study does much less overall than its Senate counterpart to advance policy discussion on areas of controversy in anti-terrorism law.

Table 5 summarizes 19 key areas of controversy and uncertainty in anti-terrorism law and the extent to which each committee addressed them by making recommendations (as opposed to simply engaging in discussion about them). These issues had been well covered in the media and by the academic, non-governmental and policy communities, and all were within the purview of the two committees. It is reasonable to expect, therefore, that each would attract scrutiny (and a recommendation of some sort, even one merely defending the status quo).

#### The government response

In July 2007 the government responded to the Commons report (but not the Senate report) (Department of Justice 2007). For many of the



Table 5 Commons and Senate Reports: Coverage of Key Issues, Canada						
Area of concern	Commons (majority report)			Senate		
	Major changes	Minor changes	Status quo	Major changes	Minor changes	Status quo
<b>Constitutional issues</b>						
Definition of "terrorist activity"			√	√		
Anti-leakage provision in the SOIA				√		
Secrecy provisions in the CEA (especially s. 38)		√		√	√	
<b>Immigration law</b>						
Security certificates	√			√	√	
Removal to torture				√	√	
<b>Privacy and secrecy</b>						
Revamped lawful access rules (especially in relation to Internet communications)						
Passenger Protect, under the <i>Aeronautics Act</i>					√	
Information-sharing with foreign governments				√		
Scope of CSE intercept authority under the <i>National Defence Act</i>		√		√	√	
Government secrecy, including issues relating to the Arar inquiry					√	
<b>Investigative powers and techniques</b>						
Ethnic profiling					√	
Preventive detention	√			√	√	
Investigative hearings	√			√	√	
Solicitor-client confidentiality in relation to terrorism-financed crimes	√					
<b>Listing</b>						
Terrorist group listing	√			√	√	
Deregistration of charities	√					
<b>Accountability</b>						
Review by specialized review agencies of the security services (most notably, the RCMP)				√		
Enhanced parliamentary review in the national security area	√				√	
Periodic review of ATA by a parliamentary committee	√			√		
Total	11/19 (major: 8/11)			16/19 (major: 12/19)		

Commons recommendations, the government was dismissive or simply noted the recommendation and proposed further study. On the issue of further parliamentary review of anti-terrorism law, the government's response was particularly ambiguous. Noting that the focus on the ATA is artificial, given the extent to which national security and anti-terrorism legislation is spread across the statute books and the fact that these laws do not fit neatly into any existing subject-matter basket, the government indicated that "reviews should be conducted when they are needed, as opposed to having a pre-set timetable."<sup>39</sup> This statement implies that periodic, repeat reviews are not on the government's agenda.

### *The sunseting of "preventive detention" and investigative hearings*

The delay in completing the three-year review had implications for the second form of parliamentary reconsideration anticipated in the ATA. Two unusual law-enforcement powers established by the ATA — "preventive detention" and investigative hearings — included sunseting provisions. In practice these powers would expire in March 2007 unless rescued beforehand by a resolution in both Houses of Parliament. Before turning to the parliamentary debate on sunseting, I will outline the content of the provisions.<sup>40</sup>

#### *Preventive detention*

Formally titled Recognizance with Conditions, the so-called preventive detention provisions clearly were designed to foil terrorist plots on the cusp of execution. Stanley Cohen describes their purpose this way:

The whole scheme is designed to disrupt nascent suspected terrorist activity by bringing a person before a judge who would then evaluate the situation and decide whether it would be useful...to impose conditions on the person. The purpose...is not to effectuate an arrest but merely to provide a means of bringing a person before a court for the purposes of judicial supervision. (Cohen 2005, 218)

With the consent of the federal attorney general, a peace officer could lay an information before a provincial court judge if he or she *believed* on reasonable grounds that a "terrorist activity" was going to be carried out and *suspected* on reasonable grounds that the imposition of recognizance with conditions or arrest was needed to prevent that terrorist activity.<sup>41</sup> The judge could then order that the person named in the information appear in court.

Under exigent circumstances, where there were grounds for laying an information (or where information had in fact been laid) and a peace officer suspected on reasonable grounds that the person must be detained in order to prevent a terrorist activity, the person could be arrested without warrant. Subsequently, an information would be laid and the person brought before a provincial judge within 24 hours or, if a judge was not readily available, "as soon as possible."

Whether the person was arrested with or without warrant, when he or she ultimately appeared before the judge, the judge would order his or her release unless the peace officer showed cause for detention, including the likelihood that a terrorist activity would be carried out if the person were to be released.

Alternatively, where the judge declined to order release, the judge could adjourn proceedings for up to 48 hours pending a full hearing on the peace bond issue. The effect of these provisions was theoretically to enable preventive detention on suspicion of terrorist activity for an initial period of up to 24 hours (longer if a judge was not available within that period) and then, if the judge agreed to an adjournment but did not release the detainee, detention for another 48 hours. Preventive arrest could last, in other words, for some 72 hours.

When a full hearing was held, the judge would consider whether the peace officer had reasonable grounds for suspicion. If the officer had reasonable grounds, the judge could order the person to enter into a recognizance of up to 12 months' duration, a limitation on liberty equivalent to the still existing peace bond power in the Criminal Code.<sup>42</sup>

#### *Investigative hearings*

Investigative hearings were a tool grafted onto the Criminal Code by the ATA to facilitate the investigation of actual or anticipated terrorism offences. A peace officer investigating a terrorism offence could apply, with consent of the federal attorney general, for an order from a provincial or superior court judge on the "gathering of evidence." A judge could then compel the presence of the person at a hearing in which the police could question the individual.<sup>43</sup> A person named in such an order was obliged to "answer questions put to the person by the Attorney General or the Attorney General's agent, and shall produce to the presiding judge things that the person was ordered to bring, but may refuse if answering a question or producing a thing would disclose information that is protected by any law relating to non-disclosure of information or to

privilege."<sup>44</sup> Fear of self-incrimination was not a ground for refusing to answer a question, but the provision included derivative use protections; that is, no answer made and no thing provided by a person pursuant to the order and no evidence derived from it could be employed in a prosecution against that person, except for perjury.<sup>45</sup>

In 2004 the Supreme Court of Canada upheld the investigative hearing provisions as constitutional under the Charter. In *Application under s. 83.28 of the Criminal Code*,<sup>46</sup> a majority of the Court rejected arguments that investigative hearings violated judicial independence by enlisting judges in a police investigation. However, the Court interpreted the protections against self-incrimination liberally, extending derivative use immunity beyond criminal proceedings to administrative matters such as immigration and extradition hearings.<sup>47</sup>

#### *Parliamentary review*

Canadian law generally does not enlist judges to play a supporting role in criminal investigations. Likewise, preventive detention is alien to the Canadian criminal law tradition. For this reason, investigative hearings and preventive detention were controversial features of the ATA.<sup>48</sup>

Concern about the reach of these provisions prompted Parliament to impose a reporting obligation on the government, requiring annual disclosure of the number of times the power had been used.<sup>49</sup> By 2007 neither power had ever been used.<sup>50</sup> As noted, Parliament also inserted an automatic sunset provision, with the effect of terminating both powers in early 2007 unless overridden by vote in Parliament.<sup>51</sup>

In the end, a majority on both the Commons committee and the Senate committee recommended, in 2006 and 2007 respectively, that these provisions be extended (House of Commons Subcommittee 2006; Senate of Canada 2007). Because of the delays in finalizing its review, the Commons committee issued its recommendation as an interim report, long before the final review was carried out. However, a motion to renew the provision was defeated by the opposition parties in February 2007, following an acrimonious debate in the House of Commons brimming with political innuendo.

Opponents of renewal on the opposition benches invoked civil liberty concerns in justifying their views. In the case of the Liberals, however, the party was divided between those who now believed the

provisions should sunset and those – including several MPs who had been among the chief proponents of these same provisions during Liberal governments – who wished to see the measures left intact.

Parliamentarians who opposed the extension were portrayed as soft on terrorism and (in one notorious instance at least) had their personal integrity questioned, usually by government MPs and occasionally by the prime minister himself. In a more policy-relevant objection, expiry of the investigative hearing provision was painted by supporters as a blow to the ongoing Air India criminal inquiry.

Nuance vanished in the debate. Lost in the political fog were recommendations by the Commons committee majority (comprising both Liberals and Conservatives) in its 2006 interim report (House of Commons Subcommittee 2006) proposing changes to a renewed investigative hearing provision that would prevent its use in relation to past (as opposed to anticipated) terrorist offences – including the Air India bombing. Nor did parliamentarians apparently dwell on the fact that even with the expiry of preventive detention, parallel anti-terrorism peace bonds would persist,<sup>52</sup> allowing detention (albeit under warrant) pending adjudication of the peace bond issue.<sup>53</sup>

#### *Conclusion on parliamentary review of the ATA*

A number of observations about parliamentary review in the national security area may be extracted from this brief overview of the ATA's enactment and review process.

- Complexity and scope – Parliament is obviously capable (as a constitutional matter) of enacting complex and comprehensive legislation, promulgated via a single bill of Parliament. The ATA, the *Public Safety Act* and the *IRPA* are all post-9/11 cases in point. It is also true, however, that Parliament and parliamentarians lack the time, resources and at times inclination to fully grasp the complexity and implications of every provision enacted in large omnibus bills. In the conventional committee process – whether at the time a bill passes through the legislative process or during a post-enactment review – parliamentarians depend on governmental or nongovernmental witnesses or on their own judgement, enhanced by parliamentary research support, to identify problematic issues in the legislative framework. Nongovernmental witnesses often self-identify or may occasionally be identified by parliamentarians or parliamentary staff via what appears to be an informal referral



system. The different issues addressed by the Senate and Commons committees in the ATA review indicate that these variables may drive committees to place different emphases on different matters.

- Continuity – Committee membership obviously affects outcomes, and turnover in that membership almost certainly disrupts committee institutional knowledge. Straddling two governments and cleaved by an election, the work of the Commons ATA review committee surely was affected by the changing composition of its membership, in terms of both delay and content. The Senate, whose turnover is affected by retirement rather than electoral disfavour, is less vulnerable to this problem.
- Personality and politicization – The policy environment is also influenced by the personalities of key players and the political setting in which matters are considered. Complexity and continuity may have a lesser bearing on outcome in sedate political environments, where partisan impulses are subdued and responses are not driven by crises. In the absence of such a setting, reasoned consideration may be abandoned in favour of political fisticuffs, a phenomenon exemplified by the sunset debate of February 2007.

## Comparative Parliamentary Review in National Security Matters

The Canadian Parliament is not alone in its vulnerability to these problems. Other Westminster democracies may have useful lessons to offer regarding parliamentary review of anti-terrorism measures. In this second part of the article I consider what guidance might be drawn from the approach to national security policy-making taken by the United Kingdom, Australia and New Zealand. The systems developed in the United Kingdom and Australia, in particular, appear to represent a net improvement over the Canadian approach. This section focuses on two issues: "precursor expert review," and the approach applied by parliamentary committees in national security matters.

### Precursor expert review

Both the United Kingdom and Australia have developed systems in which arm's-length experts are asked to review anti-terrorism law. The resultant reviews inform

parliamentary assessments and scrutiny. This practice will be referred to below as "precursor expert review."

### United Kingdom

Precursor expert review of modern anti-terrorism law in the United Kingdom has come in two forms. First, review has been conducted by a committee of privy councillors appointed by the secretary of state.<sup>54</sup> This practice was employed for the *Anti-terrorism, Crime and Security Act 2001 (ATCSA)*, which required a privy councillor report within two years of passage. The net result was a report by the Newton Committee (the privy councillor committee) submitted to the government and then tabled in Parliament in 2003. The ATCSA review process was linked to repeal provisions: Sections of the Act specified in the report would sunset within six months of the report's being tabled in Parliament unless debated in both houses.<sup>55</sup>

In their 2003 report, the seven members of the Newton Committee expressed concern over the breadth of the ATCSA and the pace at which it had been enacted (Privy Councillor Review Committee 2003). The Committee urged the repeal of provisions in part 4 of the ATCSA, namely sections that permitted the indefinite detention of foreign terrorist suspects who could not be deported. It also made a number of other, often very detailed, policy and legal recommendations. However, the Committee went beyond mere suggestions and criticisms and recommended that the Act be allowed to expire, subject to renewal by Parliament. In so doing, it was not signalling disapproval of the entire Act but advocating that the legislation be treated as emergency law and subjected to full parliamentary debate and reconsideration (Privy Councillor Review Committee 2003, 9).

Subsequently the government prepared a discussion paper on the ATCSA, released in February 2004, responding to the Newton Committee report and essentially defending the statute (United Kingdom 2004). The matter was debated in the House of Commons in February<sup>56</sup> and in the House of Lords in March.<sup>57</sup> As a result, the Act was maintained in force.

Parallel to these review processes mandated by statute, the parliamentary Joint Committee on Human Rights<sup>58</sup> produced a number of reports on the ATCSA and anti-terrorism law generally. On balance, the reports were critical of part 4 of the ATCSA and endorsed recourse to a standard criminal law prosecution model.<sup>59</sup> In framing their critiques, the parliamentary reports often relied on the findings of the Newton Committee and of Lord Carlile, the independent

examiner of British terrorist laws discussed below. Ultimately, part 4 was repealed and replaced by a system of "control orders" pursuant to the *Prevention of Terrorism Act 2005* (also discussed below). This change followed a ruling by the law lords of the House of Lords (the country's highest court of appeal) declaring part 4 incompatible with the United Kingdom's obligations under the *European Convention on Human Rights*.<sup>60</sup>

The second type of precursor expert review in the United Kingdom comes in the form of an independent examiner of terrorism legislation. Prior to its repeal, part 4 of the *ATSCA* required that the secretary of state appoint an individual to conduct periodic reviews of its anti-terrorism removal and detention provisions. This report was to be then tabled in Parliament.

While part 4 no longer exists, equivalent individual examiner functions are found in (or have been applied in relation to) all of the country's key anti-terrorism laws, as summarized in table 6.

Since autumn 2001, the independent examiner has been Lord Carlile of Berriew QC, a Liberal Democrat peer in the House of Lords. By spring 2008, Lord Carlile had prepared nine reports under the *Terrorism*

*Act 2000*,<sup>61</sup> three reports under part 4 of the *ATSCA* (before its repeal)<sup>62</sup> and at least five reports under the *Prevention of Terrorism Act 2005*, including a response to the legislative proposals that ultimately culminated in the *Terrorism Act 2006*.<sup>63</sup> Lord Carlile had also prepared a special report on the definition of terrorism at the request of the Home Secretary (Lord Carlile of Berriew 2007c), in turn responding to a request from the chairman of the Parliamentary Select Committee on Home Affairs. At the time of writing, no annual reports have been issued in relation to the *Terrorism Act 2006*.

These expert reports have figured prominently in parliamentary deliberations on anti-terrorism legislation. Lord Carlile's studies are a key source of information for parliamentarians and for witnesses appearing before parliamentary committees.<sup>64</sup>

### Australia

Australia has employed a different form of precursor expert review. Pursuant to the *Security Legislation Amendment (Terrorism) Act 2002*, the attorney general was required to order a review of key anti-terrorism laws enacted by Australia within three years of their adoption.<sup>65</sup> The Act specified the composition of

**Table 6**  
**Independent Review of Anti-terrorism Law, United Kingdom**

Statute	Key functions	Independent review function
<i>Terrorism Act 2000</i>	Defines terrorism; creates system for proscribing terrorist organizations; creates several terrorist offences; specifies powers available during anti-terrorism investigations.	Requires the secretary of state to lay a report before Parliament on the workings of the statute. <sup>1</sup> The independent reviewer report responds to this requirement. <sup>2</sup> Pursuant to the <i>Terrorism Act 2006</i> , the secretary of state has a formal obligation to appoint an independent reviewer. <sup>3</sup> The reviewer must conduct an annual review of the operations of the <i>Terrorism Act 2000</i> and may also conduct a review from time to time. The secretary of state must table the reviewers' reports in Parliament.
<i>Prevention of Terrorism Act 2005</i>	Creates a system of "control orders" – constraints on liberty imposed by the executive (with varying degrees of judicial oversight) "for purposes connected with protecting members of the public from a risk of terrorism." <sup>4</sup>	Requires the secretary of state to appoint a person to conduct an annual review of the operations of the Act (as well as comment on any government proposals to amend the Act). The report must be tabled in Parliament. <sup>4</sup>
<i>Terrorism Act 2006</i>	Amends the definition of terrorism; creates a new series of terrorism offences, including encouragement of terrorism; enhances anti-terrorism investigation and detention powers.	Requires the secretary of state to appoint a person to conduct an annual review of the operations of part I of the Act (containing the new offences). The reviewer may also conduct a review from time to time. The reports must be tabled in Parliament. <sup>5</sup>

<sup>1</sup> *Terrorism Act 2000*, s. 126.

<sup>2</sup> See discussion in Lord Carlile of Berriew QC (2001, 5).

<sup>3</sup> *Terrorism Act 2006*, s.36.

<sup>4</sup> *Prevention of Terrorism Act 2005* (U.K.), 2005 c. 2 [*Prevention of Terrorism Act*], s.14.

<sup>5</sup> *Prevention of Terrorism Act 2005* (U.K.), 2005 c. 2 [*Prevention of Terrorism Act*], s. 1.

<sup>6</sup> *Terrorism Act 2006*, s.36.

the review body, namely "(a) up to two persons appointed by the Attorney-General, one of whom must be a retired judicial officer who shall be the Chair of the Committee; and (b) the Inspector-General of Intelligence and Security; and (c) the Privacy Commissioner; and (d) the Human Rights Commissioner; and (e) the Commonwealth Ombudsman; and (f) two persons (who must hold a legal practising certificate in an Australian jurisdiction) appointed by the Attorney-General on the nomination of the Law Council of Australia."<sup>66</sup>

The statute charged this review body with receiving public submissions and holding public hearings, then filing a report within six months with both the attorney general and the Parliamentary Joint Committee on Intelligence and Security (JCIS). The latter was obliged to take account of the report in its own statutory review process (discussed below).

In keeping with these provisions, the expert review body – the Sheller Committee – was established by the attorney general in October 2005. During its public inquiry, the Sheller Committee received 29 submissions and heard evidence from 18 witnesses over five days of hearings in four metropolitan areas. The Committee filed its report with the attorney general and the JCIS in April 2006 (Security Legislation Review Committee 2006). The JCIS considered the report "an important part of the evidence" in its own study. Among the recommendations subsequently made by the JCIS was the creation of a standing independent examiner of anti-terrorism law (analogous to the British system). This independent examiner would respond to the proliferation of increasingly fragmented anti-terrorism law "by providing a consistent and identifiable focal point for the community and the executive agencies" and his or her reports would feed into parliamentary reviews of anti-terrorism law (Security Legislation Review Committee 2006, 20).<sup>67</sup>

### Parliamentary review

Internal parliamentary review of anti-terrorism law in other Westminster democracies has come in two forms: review by regular parliamentary committee, and review by specially created national security committees.

#### General committee review

##### *Committee review proprio motu*

As we have seen, anti-terrorism law straddles many more conventional areas of law, not least civil and human rights law. Not surprisingly, parliamentary

committees with specific subject-matter jurisdiction affected by anti-terrorism law have studied the implications of this legislation for their areas of responsibility. In so doing, they have often acted on their own motion, without formal statutory obligation to do so. This tendency is particularly strong in the United Kingdom. The Commons Constitutional Affairs Committee<sup>68</sup> and Home Office Committee<sup>69</sup> and the House of Lords and House of Commons Joint Committee on Human Rights<sup>70</sup> have all conducted studies on anti-terrorism issues, in addition to issuing reports as part of the process of enacting relevant bills.

#### *Committee review mandated by statute*

In other circumstances, general committees have conducted studies in response to sunset provisions in anti-terrorism laws. The United Kingdom has a long-standing practice of including sunset provisions in its anti-terrorism laws.<sup>71</sup> These provisions limit the lifespan of the legislation, unless it is renewed by Parliament. Sunset provisions in modern British anti-terrorism statutes is more uneven, with sunset provisions existing in some but not all statutes.<sup>72</sup> The ATCSA, for example, did include sunset provisions. Sections in part 4 of the Act, permitting the indefinite detention of foreign terrorist suspects who could not be deported, were to sunset in 2006 and could expire before that time if not renewed annually by the secretary of state by statutory instrument, a draft of which had been laid before and approved by resolution of each House of Parliament.<sup>73</sup> As we have seen, these provisions have since been replaced by the control order system under the *Prevention of Terrorism Act 2005*. That instrument, too, includes sunset rules: The control order regime will expire after renewable periods of 12 months unless the government tables a regulation renewing the system in Parliament and the regulation is approved by resolution in each House.<sup>74</sup> These sunset provisions have all sparked reviews by regularly constituted parliamentary committees, as shown in table 7.

Anti-terrorism laws in Australia, like those in the United Kingdom, include sunset rules tied to certain, specific state counter-terrorism powers.<sup>75</sup> However, in Australia, unlike in the United Kingdom, committee deliberation on these provisions usually takes place within the JCIS, a highly specialized, statutorily created national security committee mentioned above and described more fully below.

In still other cases, general committees have been tasked by statute with conducting periodic reviews with no link to sunset provisions. Specific provisions in

**Table 7**  
**Parliamentary Review of Sunset Provisions**

Jurisdiction	Sunset provision	Parliamentary action
United Kingdom	<i>Prevention of Terrorism Act 2005</i> , Sections 1 to 9	Reports by Parliamentary Joint Committee on Human Rights <sup>1</sup>
	<i>Anti-terrorism, Crime and Security Act 2001</i> , Sections 21 to 23	Report by Parliamentary Joint Committee on Human Rights <sup>2</sup>
Australia	SIO Legislation Amendment Act 2003, providing for a review of the operations, effectiveness and implications of special anti-terrorism investigative powers	Report by Parliamentary Joint Committee on ASIO, ASIS and DSD (now the Joint Committee on Intelligence and Security) <sup>3</sup>

<sup>1</sup> UK House of Lords, House of Commons Joint Committee on Human Rights (2006; 2007).

<sup>2</sup> UK House of Lords, House of Commons Joint Committee on Human Rights (2003).

<sup>3</sup> Australia Parliamentary Joint Committee on ASIO, ASIS and DSD (2005).

**Table 8**  
**Special National Security Committees in Commonwealth Countries**

	Australia	New Zealand	United Kingdom
Attribute	Joint Committee on Intelligence and Security	Intelligence and Security Committee	Intelligence and Security Committee
Statutory basis	✓ <sup>1</sup>	✓ <sup>2</sup>	✓ <sup>3</sup>
Bicameral representation	✓	N/A	✓
Multiparty membership	✓	✓	✓
Review authority			
Administration and expenditures of security and intelligence agencies	✓	✓	✓
Review any matter referred by minister	✓	✓	
Review any matter referred by Parliament	✓		
Review operation and effectiveness of security law	✓	✓	
Named operational areas excluded from review	✓	✓	
Report directly to Parliament	✓	✓	
Report indirectly to Parliament through minister/prime minister			✓
Rules on receipt and disclosure of secret information	✓	✓	✓
Rules on secrecy obligations of members	✓	✓	✓ <sup>4</sup>
Past special public reports and studies on matters relating to anti-terrorism law	✓		✓ <sup>5</sup>

<sup>1</sup> *Intelligence Services Act*, No. 152 (2001), Part 4.

<sup>2</sup> *Intelligence and Security Committee Act 1996*, No. 46.

<sup>3</sup> *Intelligence Services Act 1994*, c. 13, s. 10.

<sup>4</sup> Members of the committee are "notified" under the *Official Secrets Act*, 1989, 1987, c. 6, s. 1, and are therefore bound by that statute's strictures on security intelligence.

<sup>5</sup> United Kingdom Intelligence and Security Committee (2006; 2007).

British law, for example, require that reports be laid in front of Parliament, sparking committee review.<sup>76</sup> For its part, the New Zealand terrorist law required review by a regular select committee of the country's House of Representatives. Completed in 2005, the review was conducted by the Foreign Affairs, Defence and Trade Committee (New Zealand House of Representatives 2005). The resultant report was the most perfunctory of the parliamentary reports studied for this article. The committee's deliberations were interrupted – and obviously impaired – by an election.<sup>77</sup>

### Special committee review

In the United Kingdom, Australia and New Zealand, general committee review of anti-terrorism law is supplemented with review of security and intelligence matters by special, statutorily created and mandated statutory committees comprising parliamentarians. The composition and powers of these committees are summarized in table 8. The committees issue annual reports and, at least in the case of the United Kingdom, occasionally publish reports on anti-terrorism and other matters.

Because these bodies have statutorily-prescribed powers and responsibilities, they differ from a regular parliamentary committee. The former reports to Parliament through the prime minister while the latter is a subset of Parliament itself, whose powers and immunities flow from parliamentary privilege. The Martin government proposed an analogous statutorily created national security committee of parliamentarians for Canada in 2005. That Bill died on the order paper.

Australia has deployed the statutorily created JCIS in a key policy-shaping role. Often, this is the parliamentary committee charged with reviewing sunset provisions or undertaking statutorily required periodic review of anti-terrorism laws. For example, pursuant to the *Intelligence Services Act 2001*, the JCIS was required to review the operation, effectiveness and implications of key anti-terrorism legislation<sup>78</sup> as soon as possible after the third anniversary of its enactment. Thus it was charged with taking into account the expert Sheller Report, discussed above. In addition to the Sheller Report, the JCIS received 29 submissions and heard evidence from 13 witnesses in a session extending over approximately a day and a half in summer 2006. Its report was tabled in December 2006 (Parliamentary Joint Committee on Intelligence and Security 2006).

Other periodic reviews have focused on the terrorist organization listing provisions in Australia's Criminal

Code,<sup>79</sup> as well as assessments of individual listing decisions.<sup>80</sup> The JCIS has also conducted parliamentary inquiries in response to extraordinary anti-terrorism powers slated for sunset in Australian law.<sup>81</sup>

### Government responses

In the United Kingdom in particular, the reports generated by precursor expert review and then parliamentary committees usually draw a formal response from the government.<sup>82</sup> There is therefore a rich corpus of material explaining and justifying government policies. The British government has also adopted the practice of circulating regular and often quite detailed discussion papers to float anti-terrorism law proposals before tabling legislation.<sup>83</sup> Discussion papers and government responses appear to be less common in Australia, but they do exist (e.g., Attorney-General of Australia 2007).

### Lessons for Canada

Table 9 provides an overview of anti-terrorism law with respect to the features of parliamentary review in the four Westminster democracies covered in this article. As this table and the above discussion suggest, the key features that distinguish the United Kingdom and Australia from Canada are, first, precursor expert review and specialized, statutorily created committees of parliamentarians with national security law review functions. In the United Kingdom, annual precursor expert review by an independent reviewer, coupled with short, renewable sunset periods for some anti-terrorism provisions, means that there is a steady supply of assessments and studies of anti-terrorism provisions, now numbering in the dozens. In Australia, one-time precursor expert review fed into deliberations by a specially empowered and specialized committee of parliamentarians, tasked in turn with making its own report. Australia may now be moving towards a system of more regular precursor expert review.

In fairness, Canada has employed its own form of precursor expert review – public inquiries such as those into the Arar matter and the Air India bombing. These processes have, however, run in parallel to executive and parliamentary policy deliberations, and at times have resembled adversarial judicial proceedings more than broad-ranging policy inquiries. They have also been ad hoc, rather than periodic, and relatively narrowly focused by virtue of specific terms of reference. These inquiries are therefore not analogous, in



**Table 9**  
**Parliamentary Review Features, Canada, Australia, New Zealand and the United Kingdom**

Attribute	Canada	Australia	New Zealand	United Kingdom
Precursor expert review		✓		✓
Mandatory one-time parliamentary review of existing legislation	✓	✓	✓ <sup>1</sup>	✓
Renewed mandatory periodic parliamentary review of existing legislation		✓ <sup>2</sup>		
Mandatory review of measures taken by the executive pursuant to anti-terrorism law (e.g., terrorist group listing)		✓ <sup>3</sup>		
Sunsetting provisions requiring parliamentary intervention prior to renewal	✓	✓ <sup>4</sup>		✓
Specialized, statutorily created committee of parliamentarians		✓	✓	✓

<sup>1</sup> *Terrorism Suppression Act 2002* (NZ), 2002 No. 34, s.70 (requiring review by a House of Representatives select committee on the operation of provisions of the Act implementing UN Security Council resolution 1373 by December 2004, with a report due by December 2005).

<sup>2</sup> See, e.g., *ASIO Legislation Amendment Act 2006* (Aus.) No. 54, 2006, Sch. 2, s.33 (scheduling 2016 as the deadline for the next review of the "operation, effectiveness and implications of Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979*," division 3 being the special powers accorded to ASIO in relation to terrorism offences).

<sup>3</sup> *Criminal Code Act 1995* (Aus.), No. 12, 1995, s.102.1A.

<sup>4</sup> See, e.g., *Criminal Code Act 1995* (Aus.), No. 12, 1995, s.105.53 (sunsetting of preventive detention power after 10 years following the coming into force of the relevant statutory amendment); *Crimes Act 1914* (Aus.) No.12, 1914, s. 3UK (sunsetting declaration of a part of Australia as a prescribed security zone after 10 years following the coming into force of the relevant statutory amendment).

function or form, to the independent reviews conducted by Lord Carlile in the United Kingdom.

In sum, the British and Australian assessment procedures appear attractive when contrasted with the rather dismal experience of the recent Canadian ATA review. Precursor expert review, when coupled with subsequent consideration by an adequately resourced and stable parliamentary committee, might help to overcome some of the difficulties encountered in the ATA review process, especially at the Commons level. In keeping with the recent Australian JCIS observations, a regular precursor expert review could serve to resolve problems of complexity and scope in anti-terrorism law. With a wide-ranging mandate, an independent evaluator would be able to identify lacunae and difficulties that might escape the attention of parliamentary committees and to place them on the official agenda. The independent evaluator would therefore function in a manner analogous to existing officers of Parliament, able to bring matters lying within their subject-matter jurisdiction to the appropriate parliamentary committees.

Repeated annual or special reports by an independent reviewer also militate against the gradual normalization of anti-terrorism laws and powers – that is, the prospect that these laws will fade from public consciousness and lurk unquestioned in

Canada's statute books. Anti-terrorism provisions are too radical to be left unscrutinized. Independent reporting may also serve to galvanize more regular (and transparent) policy thinking within executive government, as it appears to have done in the United Kingdom. British government responses to independent review have produced a corpus of documents and discussion papers, many of which are much more informative than the cagey government reaction to Canada's ATA review process.

By publicly benchmarking key issues in anti-terrorism law, precursor expert review may also reduce the impact of turnover on parliamentary committees; whatever a committee's membership, it will be difficult to ignore observations made in the precursor expert review. In addition, it may be worth contemplating the Australian model, and the primacy accorded its JCIS in the review process. Whether a statutorily created parliamentary committee is more stable and expert than a regular parliamentary committee depends on design. It should be possible, however, to create a body whose membership is less fluid than that of the Commons committee in the recent ATA.

Precursor expert review might also take some of the high politics out of parliamentary deliberations on anti-terrorism issues. A credible, independent

evaluator will be difficult to ignore, or to paint in a partisan light. One wonders how the carefully considered views of such an evaluator might have affected the disappointing and superficial parliamentary debates on preventive detention and investigative hearings in February 2007.

Precursor review could prove to be especially valuable in periods of crisis or their aftermath, or in periods of intense partisanship (such as minority governments). It would prepare Parliament for responding to crises and could also serve to eliminate partisanship from parliamentary debate on complex issues such as human rights protection. A stable system of precursor review, coupled with executive response and parliamentary examination, might generate broad expertise in the area of national security law. Ideas would be tested and debated in public, laying the ground for rapid but carefully vetted responses to possible future crises. Policy actors (well versed in legal and policy matters through the precursor review process) might focus not only on clearly controversial issues that arise in legislated responses to crisis, but also on the more detailed and complex matters that, if the enactment of the original ATA is any indication, may otherwise escape scrutiny. Put another way, precursor expert review could address a number of the challenges that arise in the anti-terrorism policy environment.

Finally, precursor expert review followed by study by a parliamentary committee would combine expert consideration with more democratically legitimate investigation. Such a combination could serve to overcome the weaknesses of, respectively, legitimacy and expertise under which each would labour if one is done without the other.

All this is not to suggest that the product of precursor expert reviews would necessarily be endorsed first by parliamentary committees and then by governments – indeed, Australia's Sheller Report was rejected by the Howard government (Nicholson 2006). Further, this discussion may exaggerate the extent to which precedents drawn from the United Kingdom and Australia would cure some of the ills plaguing the recent ATA review. On the other hand, it is difficult to see a negative side to a credibly constructed precursor expert review system. Policy deliberations in the area of anti-terrorism law can only benefit from more information and assessment.

## Notes

- 1 See discussion in Lee (1999); *Telezone Inc. v. Canada (Attorney General)*, (2004), 235 D.L.R. (4th) 719 at 726 (Ont. C.A.); *Canada (Attorney General) v. Prince Edward Island (Legislative Assembly)* (2003), 46 Admin. L.R. (3d) 171 (P.E.I. S.C.).
- 2 Lee (1999, 129): "Under the law, Ministers of the Crown enjoy no special status or privilege before the House or a committee."
- 3 House of Commons *Standing Orders*, Order 108(1).
- 4 See *Parliament of Canada Act*, R.S.C. 1985 c. P-1, ss. 10-13.
- 5 "[A]ny act or omission that obstructs or impedes either House of Parliament in the performance of its functions, or that obstructs or impedes any Member or officer of such House in the discharge of his duty, or that has a tendency, directly or indirectly, to produce such results may be treated as contempt even though there is no precedent of the offence." (Maingot 1997, 193)
- 6 Standing Senate Committee on National Security and Defence; Special Senate Committee on the Anti-terrorism Act; House of Commons Standing Committee on Public Safety and National Security; House of Commons Standing Committee on Defence.
- 7 S.C. 2001, c. 41.
- 8 That said, the one area of substantive reform introduced by spring 2008 related to the security certificate process in Canadian immigration law. The bill tabled in and ultimately passed by Parliament ignored the parliamentary committee recommendations, particularly those of the Senate committee, as related to the design of the new "special advocate" office. For a further discussion of the special advocate issue, see Forcese (2007), 414 *et seq.*
- 9 For a discussion of parliamentary committees and their role, see Library of Parliament, *Compendium – House of Commons Procedure Online*, available at [http://www.parl.gc.ca/compendium/web-content/c\\_g\\_committees-e.htm](http://www.parl.gc.ca/compendium/web-content/c_g_committees-e.htm).
- 10 Commons *Standing Orders*, Order 108.
- 11 S/RES/1373 (2001), available at [http://www.un.org/Docs/journal/asp/ws.asp?m=S/RES/1373\(2001\)](http://www.un.org/Docs/journal/asp/ws.asp?m=S/RES/1373(2001)).
- 12 The Hon. John Manley (Deputy Prime Minister, Lib.), *Evidence*, 37th Parl., 1st Sess., Sub-Committee on National Security of the Standing Committee of Justice and Human Rights (April 10, 2002).
- 13 The Hon. Irwin Cotler, P.C., M.P., Minister of Justice and Attorney General of Canada, Department of Justice Canada, Proceedings of the Special Senate Committee on the Anti-terrorism Act, Issue 2 – Evidence – Meeting of February 21, 2005, Morning meeting ("There are specific mandates that we were asked by the U.N. Security Council to incorporate and enact by way of Bill C-36...Therefore, in response to this U.N. Security Council mandate...you then have specific offences").
- 14 R.S.C., 1985, c. C-46.
- 15 R.S.C., 1985, c. O-5.
- 16 S.C. 2004, c. 15.
- 17 S.C. 2001, c. 27.
- 18 R.S.C., 1985, c. C-23.
- 19 R.S.C., 1985, c. S-7.
- 20 S.C. 1997, c. 9.
- 21 R.S.C. 1985, c. 22 (4th Supp.).
- 22 R.S.C., 1985, c. N-5.
- 23 Being Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11.
- 24 This point was underscored by the Supreme Court of Canada in *Application under s. 83.28 of the Criminal Code*, 2004 SCC 42, a 2004 constitutional challenge to the investigative hearing provisions in the ATA. Writing for a majority on this point, Justices Iacobucci and Arbour observed that the *Anti-terrorism Act* was not an instrument aimed at national security in general but had a narrower antiterrorism objective. Moreover, they cautioned that courts applying the new law "must not fall prey to the rhetorical urgency of a perceived emergency or an altered security paradigm." *Ibid.*, para. 39.
- 25 *R. v. Khawaja*, [2006] O.J. No. 4245 (Ont. S.C.J.).
- 26 *Canada (Attorney General) v. O'Neill*, [2004] O.J. No. 4649 (Ont. S.C.J.).
- 27 *Toronto Star Newspapers v. Canada*, 2007 FC 128 (FC); *Khawaja v. Canada*, 2007 FC 463 (FC).
- 28 *Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9.
- 29 See, for example, *Jaballah (Re)*, 2006 FC 1230 (FC).
- 30 See, for example, *Canada (Attorney General) v. Commission of Inquiry into the Action of Canadian Officials in Relation to Maher Arar*, 2007 FC 766 (FC).
- 31 ATA, S.C. 2001, c. 41, s.145.
- 32 This number excludes what appeared to be simply logistical meetings.
- 33 Two MPs who were not formal members of the subcommittee but who are listed in the final report as participants – Garry Breitkreuz and Derek Lee – were present for some of these sessions. Lee was present for three sessions (one public) and Breitkreuz for one (public) session.
- 34 Note, however, that the precise role of Derek Lee and Garry Breitkreuz – the two participating MPs who were not subcommittee members – in drafting the final report is not apparent in the report itself.
- 35 This number excludes what appeared to be simply logistical meetings.
- 36 The recommendations that I categorized for table 4 are the following: Commons – *Major changes*: Main Report, Recommendations 2, 6, 7, 8, 12, 13, 16, 17, 24, 25, 27, 29, 30, 50, 53, 54, 55, 56, 57, 58, 59, 60; Interim Report, Recommendations 3, 4. *Minor changes*: Main Report, Recommendations 3, 4, 5, 9, 10, 11, 14, 15, 18, 19, 20, 21, 22, 23, 26, 28, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 51, 52; Interim Report, Recommendations 5, 6, 7, 8, 9, 10. *Status quo*: Main Report, Recommendation 1; Interim Report, Recommendations 1 and 2. Senate – *Major changes*: Recommendations 1, 2, 3, 7, 8, 9, 10, 12, 13, 14, 18, 24, 25, 27, 28, 29, 30, 31, 34,



- 35, 38, 40. *Minor changes: Recommendations 4, 5, 6, 11, 15, 17, 19, 20, 21, 22, 23, 26, 32, 33, 36, 37, 39.* Status quo affirmed: Recommendation 16.
- 37 R.S.C., 1985, c. C-5.
- 38 S.C. 2001, c. 41, s. 113.
- 39 See [http://www.justice.gc.ca/en/anti\\_terr/rep\\_res/cc\\_hc/rep\\_res\\_12.html](http://www.justice.gc.ca/en/anti_terr/rep_res/cc_hc/rep_res_12.html).
- 40 For a discussion of these provisions, and their analogues in other jurisdictions, see Forcese (2007).
- 41 *Criminal Code*, s. 83.3.
- 42 *Criminal Code*, s.810.01.
- 43 *Criminal Code*, subs. 83.28(5).
- 44 *Criminal Code*, subs. 83.28(8).
- 45 *Criminal Code*, subs. 83.28(10).
- 46 2004 SCC 42.
- 47 For a thorough assessment of this case, see Stewart (2005).
- 48 See, for example, the critique by the Canadian Association of University Professors (CAUT), *Submission to the House of Commons, Subcommittee on Public Safety and National Security Regarding the Review of the Anti-Terrorism Act* (February 2005).
- 49 *Criminal Code*, s. 83.31.
- 50 Efforts to use the investigative hearing power in the Air India investigation were delayed by the constitutional challenge addressed by the Supreme Court in *Application under s. 83.28 of the Criminal Code*, 2004 SCC 42.
- 51 *Criminal Code*, s. 83.32.
- 52 *Criminal Code*, s. 810.01.
- 53 *Criminal Code*, s. 515. See also *R. v. Cachine* (2001), 154 C.C.C. (3d) 376 (B.C.C.A.).
- 54 See, for example, *Anti-terrorism, Crime and Security Act 2001*, c.24, s.122.
- 55 ATCSA, s.123.
- 56 HC Deb 25 February 2004.
- 57 HL Deb 4 March 2004.
- 58 *Anti-terrorism, Crime and Security Act 2001: Statutory Review and Continuance of Part 4*, Sixth report of session 2003-04, HL Paper 38, HC 381, February 24, 2004, and *Continuance in Force of Sections 21 to 23 of the Anti-terrorism, Crime and Security Act 2001*, Fifth report of 2002-03, HL Paper 59, HC 462; *Review of Counter-terrorism Powers*, Eighteenth report of session 2003-04, HL Paper 158, HC 713, 4 August 2004, and *Anti-terrorism, Crime and Security Bill*, Second report of 2001-02, HL Paper 37, HC 372.
- 59 See discussion in House of Commons Library, *The Prevention of Terrorism Bill*, Research Paper 05/14 at 8 (February 2005), available at <http://www.parliament.uk/commons/lib/research/rp2005/rp05-014.pdf>.
- 60 *A and others v. Secretary of State for the Home Department*, [2004] UKHL 56.
- 61 See Lord Carlile of Berriew, QC (2001, 2002a, 2003a, 2004a, 2004b, 2004c, 2006a, 2006b, 2007a).
- 62 See Lord Carlile of Berriew, QC (2002b, 2003b, 2005a).
- 63 See See Lord Carlile of Berriew, QC (2005b, 2006c, 2006d, 2007b, 2008).
- 64 A keyword search of the UK Parliamentary Web site confirms the regularity in which Lord Carlile's work is referred to in parliamentary proceedings.
- 65 *Security Legislation Amendment (Terrorism) Act 2002*, No. 65, 2002, s.4.
- 66 Ibid.
- 67 It is also notable that Australia has turned to its law reform commission to review particularly contentious criminal laws related to national security, specifically sedition. This approach is not without its critics, and its impact on the Australian policy-making process has been limited. See Bronitt and Stelios (2006).
- 68 Constitutional Affairs Committee, *Seventh Report, The operation of the Special Immigration Appeals Commission (SIAC) and the use of Special Advocates*, HC 323-I (April 3, 2005), available at <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmconst/323/323i.pdf>.
- 69 Home Office Committee, *Fourth Report, Terrorism Detention Powers*, HC 910 (July 3, 2006), available at <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmhaff/910/910i.pdf>; *Sixth Report, Terrorism and Community Relations*, HC 165 (April 6, 2005), available at <http://www.publications.parliament.uk/pa/cm200405/cmselect/cmhaff/165/165.pdf>.
- 70 Joint Committee on Human Rights, *Nineteenth Report, Counter-Terrorism Policy and Human Rights: 28 days, intercept and post-charge questioning*, HL 157/HC 790 (July 30, 2007), available at <http://www.publications.parliament.uk/pa/jt200607/jtselect/jtrights/157/157.pdf>; *Twenty-Fourth Report, Counter-Terrorism Policy and Human Rights: Prosecution and Pre-Charge Detention*, HL 240/HC 1576 (Aug. 1, 2006), available at <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/240/240.pdf>; *Third Report, Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters*, HL 75-I/HC 561 (Dec. 5, 2005), available at <http://www.publications.parliament.uk/pa/jt200506/jtselect/jtrights/75/75i.pdf>; *Eighteenth Report, Review of Counter-terrorism Powers*, HL 158/HC 713 (4 Aug. 2004), available at <http://www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/158/158.pdf>.
- 71 See, for example, *Prevention of Violence (Temporary Provisions) Act of 1939-1954 and Prevention of Terrorism (Temporary Provisions) Acts of 1974-1989*.
- 72 Statutes lacking sunset provisions include *Terrorism Act 2006*, c.11, and *Terrorism Act 2000*, c.11.
- 73 ATCSA, s. 29.
- 74 For British anti-terrorism laws with sunset provisions, see *Prevention of Terrorism Act 2005*, c.2, s.13.
- 75 See, for example, *Australian Security Intelligence Organisation Act 1979*, s.34ZZ, as amended by *ASIO Legislation Amendment Act 2006* (Aus.) No. 54, 2006, Sch. 2, s.32 (establishing 2016 as the sunset point for special powers accorded to ASIO in relation to terrorism offences).
- 76 See, for example, ATCSA, s.103, concerning the tabling of a draft Voluntary Code of Practice on Retention of Communications Data in Parliament. This draft was reviewed by the Joint Committee on Human Rights, *Sixteenth Report, Draft Voluntary Code of Practice on Retention of Communications Data under Part 11 of the*

*Anti-terrorism, Crime and Security Act 2001*, HL 181/HC 1272 (14 Nov. 2003), available at <http://www.publications.parliament.uk/pa/jt200203/jtselect/jtrights/181/181.pdf>.

- 77 Indeed, the report makes exactly this point, noting that the committee "had limited opportunity to consider the evidence and advice that has been received on the review" (New Zealand House of Representatives 2005, 3).
- 78 Specifically, the *Security Legislation Amendment (Terrorism) Act 2002*, the *Border Security Legislation Amendment Act 2002*, the *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002*, and the *Suppression of the Financing of Terrorism Act 2002*.
- 79 *Criminal Code 1995*, s.102.1A(2) (requiring the JCIS to review, as soon as possible after the third anniversary of the commencement of the listing section, its operation, effectiveness and implications). An inquiry into these provisions by the JCIS is underway. See <http://www.aph.gov.au/house/committee/pjcis/proscription/index.htm>.
- 80 *Criminal Code 1995*, s.102.1A permits the JCIS to review a listing regulation. To date, it has issued several reports on the listing of individual groups. See <http://www.aph.gov.au/house/committee/pjcis/reports.htm>.
- 81 *ASIO Legislation Amendment Act 2003* (Aus.) No. 143, 2003, Sch. 2 (providing for a review by the JCIS of the operations, effectiveness and implications of the Act, creating special anti-terrorism investigative powers, by June 2006). Under the *ASIO Act*, as it then was, these powers – found in Part III of the Act – were to expire within three years of enactment (that is, in June 2006). The JCIS reported in November 2005, and Part III has been retained, with another review to be conducted by 2016. See JCIS, *Review of Division 3 Part III of the ASIO Act 1979 – Questioning and Detention Powers* (November 2005), available at [http://www.aph.gov.au/house/committee/pjcaad/asio\\_ques\\_detention/report/fullreport.pdf](http://www.aph.gov.au/house/committee/pjcaad/asio_ques_detention/report/fullreport.pdf).
- 82 See, for example, documents linked from Home Office, Independent Reviews of Legislation, available at <http://security.homeoffice.gov.uk/legislation/independent-review-legislation/>.
- 83 See, for example, the consultation documents for proposed *Counter-terrorism Bill 2007*, available at <http://security.homeoffice.gov.uk/legislation/proposed-new-legislation/>.

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Craig Forcese rappelle que le Parlement du Canada a adopté la *Loi antiterroriste* (LAT) de 2001 à toute vitesse (en un peu plus de deux mois), réagissant sans attendre aux événements du 11 septembre et à l'adoption de la résolution 1373 du Conseil de sécurité des Nations Unies.

Or, de nombreux événements qui se sont produits depuis suscitent les mêmes préoccupations que celles qui ont animé le débat sur la LAT.

Le Parlement et les parlementaires n'ont ni le temps, ni les ressources, ni, parfois, l'inclination voulus pour saisir pleinement la complexité et les répercussions éventuelles de toutes les dispositions comprises dans un projet de loi omnibus. Ils ne sont pas toujours à même de prévoir toutes les difficultés ou de parer à toutes les lacunes qu'il peut présenter.

Il semble bien, ajoute l'auteur, que l'examen parlementaire de la LAT mené de 2004 à 2007 ait confirmé cette conclusion. Les deux comités chargés de cet examen — l'un rattaché à la Chambre des communes, l'autre au Sénat — ont produit de longs rapports qui, à l'occasion, traitent même des questions de fond, mais avec un retard de plusieurs années. La composition du comité des Communes, en particulier, a sensiblement changé entre le moment où la plupart des témoignages ont été déposés et la rédaction du rapport du comité. Contrairement au rapport du comité sénatorial, le rapport majoritaire du comité des Communes ou bien passe sous silence un certain nombre de questions qui ont soulevé des polémiques depuis le 11 septembre, ou bien ne formule aucune recommandation à leur égard. Les délibérations des deux comités n'ont guère influé sur les débats âpres et parfois simplistes qui ont eu lieu en février 2007 à propos de la prorogation de deux dispositions de la LAT assorties de clauses de temporisation, soit celles concernant les audiences d'investigation et la détention préventive.

Le Parlement canadien n'est pas le seul à devoir composer avec ces problèmes. L'expérience d'autres démocraties « à la Westminster » offre des leçons utiles en ce qui a trait aux examens parlementaires des mesures antiterroristes. Le Royaume-Uni et l'Australie, notamment, ont mis en place des mécanismes qui semblent bien supérieurs au système canadien.

Un élément crucial qui distingue l'approche adoptée par ces deux pays de celle qui est en vigueur au Canada est ce qu'on pourrait appeler une « expertise préalable », c'est-à-dire une évaluation publique de la loi antiterroriste par un expert ou un comité indépendant, soit avant son adoption, soit sur

une base périodique après l'adoption, dans le but d'aider à encadrer et focaliser les délibérations parlementaires. Un second élément réside dans la création, au Royaume-Uni et en Australie, de comités statutaires spécialisés, composés de parlementaires (il ne s'agit pas ici de comités parlementaires au sens habituel du terme), qui ont pour mandat de passer en revue la législation nationale sur la sécurité.

Les procédés d'évaluation employés à Westminster et à Canberra présentent un intérêt certain lorsqu'on les compare au bilan plutôt pitoyable du dernier examen de la LAT au Canada. Une expertise préalable, si elle est suivie d'une analyse par un comité parlementaire stable qui dispose de ressources adéquates, pourrait aider à éviter certaines des difficultés qui ont surgi au cours de l'examen de la LAT, en particulier au niveau de la Chambre des communes.

L'auteur estime qu'un examen mené de cette façon éliminerait les problèmes soulevés par la complexité et la portée des lois antiterroristes. Une instance d'évaluation indépendante dotée d'un vaste mandat pourrait signaler des lacunes et des difficultés qui, sans cela, risqueraient d'échapper à l'attention des comités parlementaires.

La publication de rapports annuels ou spéciaux d'un évaluateur indépendant sur plusieurs années pourrait également contrer la « normalisation » graduelle des lois et pouvoirs antiterroristes, c'est-à-dire la possibilité que ces lois en viennent à disparaître peu à peu du discours public et à ne plus faire l'objet d'un examen attentif dans le recueil de lois canadiennes. Ces rapports pourraient en outre susciter une réflexion politique plus fréquente (et plus transparente) au sein de la branche exécutive de l'État, comme cela semble s'être passé au Royaume-Uni.

En mettant en exergue les principaux enjeux de la législation antiterroriste, l'expertise préalable pourrait également atténuer l'impact des changements de la composition des comités parlementaires : quelle qu'en soit la composition, en effet, les comités pourront difficilement passer sous silence les observations formulées au cours de l'examen.

L'expertise préalable pourrait par ailleurs aider à soustraire les délibérations parlementaires sur les questions antiterroristes aux querelles partisans. Il sera difficile de ne pas tenir compte des avis d'un évaluateur indépendant et crédible, ou de lui attribuer des motifs partisans.

Tout compte fait, on voit difficilement quels pourraient être les inconvénients d'un système d'expertise préalable établi sur des assises crédibles. Les délibérations politiques portant sur la législation antiterroriste ne pourront que profiter d'une information et d'une évaluation plus abondantes.



# Summary

The Canadian Parliament passed the *Anti-terrorism Act (ATA)* in 2001 at dizzying speed (in just over two months) in the immediate aftermath of 9/11 and UN Security Council resolution 1373.

Since there have been many developments that raise the same concerns that animated the original ATA debate.

Parliament and parliamentarians lack the time, resources and at times inclination to fully grasp the complexity and implications of every provision enacted in large omnibus bills, and they may be hard-pressed to anticipate difficulties or address shortcomings.

The 2004-07 parliamentary review of the ATA appears to have affirmed this conclusion, notes Craig Forcece in this study. While the reports issued by the two committees charged with reviewing the legislation – one in the Commons and one in the Senate – are lengthy and in places substantive, they were delayed by years. The Commons committee in particular underwent a turnover in membership between the point at which most evidence was heard and the drafting of the report. As compared with its Senate counterpart, the Commons majority report ignores or fails to articulate recommendations in a number of areas of controversy since 9/11. The deliberations of neither committee proved influential in the acrimonious and at times simplistic February 2007 debate over the extension of two sunset provisions of the ATA: investigative hearings and preventive detention.

The Canadian Parliament is not alone in its vulnerability to these problems. Lessons can be drawn from other Westminster democracies regarding parliamentary review of anti-terrorism measures. The United Kingdom and Australia have developed systems that appear to represent a net improvement over the Canadian approach.

One key feature that distinguishes the British and Australian approach from the Canadian one is what might be called “precursor” expert review – that is, public assessment of anti-terrorism law by an independent expert or committee, either prior to enactment or on a periodic basis thereafter, which helps to frame

the focus of parliamentary deliberations. A second difference is these countries’ specialized, statutorily created committees of parliamentarians (as opposed to parliamentary committees) mandated to review national security law.

The British and Australian assessment procedures appear attractive when contrasted with the rather dismal record of the recent Canadian ATA review. Precursor expert review, when followed by consideration by an adequately resourced and stable parliamentary committee, might serve to avoid some of the difficulties encountered in the ATA review process, especially at the Commons level.

Such a review, states the author, would eliminate problems of complexity and scope in anti-terrorism law. An independent evaluator with a wide-ranging mandate could identify lacunae and difficulties that might otherwise escape the attention of parliamentary committees.

Repeated annual or special reports by an independent reviewer could also militate against the gradual normalization of anti-terrorism laws and powers – that is, the prospect that these laws will fade from public consciousness and escape scrutiny in Canada’s statute books. Such reporting may also galvanize more regular (and transparent) policy thinking within executive government, as it appears to have done in the United Kingdom.

By publicly benchmarking key issues in anti-terrorism law, precursor expert review could also serve to reduce the impact of shifting membership on parliamentary committees; whatever a committee’s membership, it will be difficult to ignore observations made in the review.

Precursor expert review might also take some of the high politics out of parliamentary deliberations on anti-terrorism issues. A credible, independent evaluator will be hard to ignore, or to paint in a partisan light.

On balance, it is difficult to see the disadvantages of a credibly constructed precursor expert review system. Policy deliberations in the area of anti-terrorism law can only benefit from more information and assessment.